

APPEAL NO. 171155
FILED JULY 24, 2017

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 29, 2017, in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the third quarter, November 24, 2016, through February 22, 2017; (2) the appellant (carrier) waived its right to contest the claimant's entitlement to SIBs for the third quarter by failing to timely request a benefit review conference (BRC); and (3) the Request to Schedule, Reschedule, or Cancel a [BRC] (DWC-45) received on November 28, 2016, did not meet the requirements of 28 TEX. ADMIN. CODE § 141.1(d) (Rule 141.1(d)), and good cause did not exist for failing to meet these requirements.

The carrier appealed all of the hearing officer's determinations, contending that the hearing officer's determinations are erroneous as a matter of law and not supported by the evidence. The appeal file did not contain a response from the claimant to the carrier's appeal.

DECISION

Reformed in part and reversed and rendered in part.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), which resulted in an impairment rating of 15% or greater; the claimant has not commuted any portion of the impairment income benefits; the period for the third quarter of SIBs has a beginning date of November 24, 2016, and an ending date of February 22, 2017; the qualifying period for the third quarter of SIBs was from August 12 through November 10, 2016; and the minimum number of job applications or work search contacts pursuant to Rule 130.102(f) required for the third quarter qualifying period is three per week for County, the claimant's county of residence. The claimant testified he was injured when his hand went through the blade of a running table saw.

CLERICAL CORRECTIONS

The issues contained in the BRC Report and agreed to by the parties at the CCH were as follows:

1. Is the [c]laimant entitled to [SIBs] for the third quarter, November 24, 2016, through February 22, 2017?

2. Did the carrier waive its right to contest [the] claimant's entitlement to [SIBs] for the third quarter by failing to timely request a [BRC]?
3. Did the [DWC-45] received on November 28, 2016, meet the requirements of [Rule 141.1(d)] for the purpose of scheduling a [BRC] and, if not, does good cause exist for failing to meet the requirements?

However, the issues listed in the Statement of the Case of the decision incorrectly identify the SIBs quarter in dispute as being the seventh quarter of SIBs, April 8 through July 7, 2016, for Issue 1, and carrier waiver of the right to contest entitlement for the seventh quarter for Issue 2. The decision also incorrectly omits Issue 3 in the Statement of the Case, although we note the hearing officer did dispose of that issue in her decision.

Accordingly, we reform the decision as follows to state the correct issues as reported out of the BRC and as agreed to by the parties:

Is the claimant entitled to SIBs for the third quarter, November 24, 2016, through February 22, 2017?

Did the carrier waive its right to contest the claimant's entitlement to SIBs for the third quarter by failing to timely request a BRC?

Did the DWC-45 received on November 28, 2016, meet the requirements of Rule 141.1(d) for the purpose of scheduling a BRC and, if not, does good cause exist for failing to meet the requirements?

The parties also stipulated at the CCH that during the qualifying period for the third quarter of SIBs the claimant did not work or earn wages. However, the decision omits this stipulation. We reform the decision to add the following to conform to the stipulation made by the parties at the CCH:

During the qualifying period for the third quarter of SIBs the claimant did not work or earn wages.

CARRIER'S NOVEMBER 28, 2016, DWC-45 AND RULE 141.1(d)

The hearing officer found that the Texas Department of Insurance, Division of Workers' Compensation (Division) denied the carrier's November 28, 2016, DWC-45 on November 30, 2016. The November 30, 2016, Commissioner Order denying the carrier's request to schedule a BRC in evidence reflects that the carrier's request was denied because "[t]he documentation of efforts to resolve the disputed issue(s) prior to requesting a [BRC] is insufficient to meet the requirements of [Rule 141.1(d)]." The

hearing officer found that the carrier failed to comply with Rule 141.1(d) by not including supporting documentation of efforts to resolve the disputed issue, and that the evidence did not demonstrate good cause for the carrier's failure to comply with the requirements set forth in Rule 141.1(d).

Rule 141.1, effective October 1, 2010, provides in part:

- (d) Request for [BRC]. A request for a [BRC] shall be made in the form and manner required by the [D]ivision. The request shall:
1. identify and describe the disputed issue or issues;
 2. provide details and supporting documentation of efforts made by the requesting party to resolve the disputed issues, including but not limited to, copies of the notification provided in accordance with subsection (a) of this section, correspondence, e-mails, facsimiles, records of telephone contacts, or summaries of meetings or telephone conversations . . . ;
 3. contain a signature by the requesting party attesting that reasonable efforts have been made to resolve the disputed issue(s) prior to requesting a [BRC], and that any pertinent information in their possession has been provided to the other parties . . . ; and
 4. be sent to the [D]ivision and opposing party or parties.

The carrier's November 28, 2016, DWC-45 reflected that the carrier documented attempts to resolve the disputed third quarter of SIBs because it noted that the claimant was required to make three job searches each week and that the carrier had requested a complete set of job searches during the qualifying period. The hearing officer's finding that the carrier failed to comply with Rule 141.1(d) by not including supporting documentation of efforts to resolve the disputed issues is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Accordingly, we reverse the hearing officer's determination that the November 28, 2016, DWC-45 did not meet the requirements of Rule 141.1(d), and there was no good cause for failing to meet the requirements, and we render a new decision that the November 28, 2016, DWC-45 did meet the requirements of Rule 141.1(d).

CARRIER WAIVER FOR FAILING TO TIMELY REQUEST BRC

The hearing officer determined that the claimant is entitled to SIBs for the third quarter in part because she determined that the carrier waived its right to contest the claimant's entitlement to third quarter SIBs by failing to timely request a BRC. The hearing officer found that the carrier received the claimant's Application for [SIBs] (DWC-52) on November 17, 2016, and filed its DWC-45 on November 28, 2016.

Section 408.147(b) provides as follows:

If an insurance carrier fails to make a request for a [BRC] within 10 days after the date of the expiration of the impairment income benefit period or within 10 days after receipt of the employee's statement, the insurance carrier waives the right to contest entitlement to [SIBs] and the amount of [SIBs] for that period of [SIBs].

The carrier contends that it received the claimant's DWC-52 on Friday, November 18, 2016, based upon the computation of time found in Rule 102.3. The carrier argued that while the claimant's DWC-52, which states on the cover page that it contained 196 pages, was sent by facsimile transmission (fax) beginning at 4:20 p.m. on Thursday, November 17, 2016, the fax was not completed until 10:08 p.m.

Rule 102.3 provides in pertinent part the following:

(b) A working day is any day, Monday-Friday, other than a national holiday as defined by Texas Government Code, § 662.003(a) and the Friday after Thanksgiving Day, December 24th and December 26th. Use in this title of the term "day," rather than "working day" shall mean a calendar day.

(c) Normal business hours in the Texas workers' compensation system are 8:00 a.m. to 5:00 p.m. Central Standard Time with the exception of the Commission's El Paso field office whose normal business hours are 8:00 a.m. to 5:00 p.m. Mountain Standard Time.

(d) Any written or telephonic communications received other than during normal business hours on working days are considered received at the beginning of normal business hours on the next working day.

The carrier contends that because it did not receive the entire DWC-52, including the claimant's documented job searches, until after working hours on November 17, 2016, the actual date of receipt should be the beginning of normal business hours on the next working day, which is November 18, 2016. Under the circumstances of this case we agree. The claimant's theory of entitlement for third quarter SIBs was an active work search. The carrier would require all of the information relating to the claimant's job searches during the qualifying period to conduct a review of that information to determine whether the claimant is entitled to third quarter SIBs. Accordingly, we reverse the hearing officer's finding that the carrier received the claimant's DWC-52 on November 17, 2016.

The evidence established that the carrier received the claimant's DWC-52 for the third quarter of SIBs on November 18, 2016. The 10th day after November 18, 2016, is November 28, 2016. It was undisputed that the carrier filed its DWC-45 disputing the claimant's entitlement to the third quarter of SIBs on November 28, 2016. Accordingly, we reverse the hearing officer's determination that the carrier waived its right to contest the claimant's entitlement to third quarter SIBs by failing to timely request a BRC, and we render a new decision that the carrier did not waive its right to contest the claimant's entitlement to third quarter SIBs.

WORK SEARCH CONTACTS

The claimant's theory of entitlement to SIBs for the third quarter is based on an active work search effort every week of the qualifying period in dispute.

Rule 130.102(d)(1) provides, in pertinent part, that an injured employee demonstrates an active effort to obtain employment by meeting at least the following work search requirement each week during the entire qualifying period: (D) has performed active work search efforts documented by job applications. Rule 130.102(f) provides, in part, that as provided in subsection 130.102(d)(1)(C) and (D), regarding active participation in work search efforts and active work search efforts, an injured employee shall provide documentation sufficient to establish that he or she has, each week during the qualifying period, made the minimum number of job applications and or work search contacts consistent with the work search contacts established by the [Texas Workforce Commission (TWC)] which are required for unemployment compensation in the injured employee's county of residence pursuant to the TWC Local Workforce Development Board requirements.

The claimant testified he searched for jobs through an online company, Monster.com, and provided copies of email confirmations he received from that company in response to jobs for which he applied. The hearing officer stated in the Discussion that "the claimant met the work search efforts requirement by making at least three job applications and/or work search contacts for each week" during the third quarter qualifying period. The hearing officer found in Finding of Fact No. 3 that the claimant demonstrated an active effort to obtain employment each week during the entire qualifying period by performing active work search efforts documented by job applications and/or work search contacts. We note that the hearing officer incorrectly identified the disputed SIBs quarter as the seventh quarter rather than the correct third quarter. A review of all the records in evidence established that the claimant did not make three contacts during the third and seventh weeks of the third quarter qualifying period, August 26 through September 1, 2016, and September 23 through September 29, 2016, respectively. The claimant did not meet the requisite number of work

searches during each week of the third quarter qualifying period. We therefore reverse the hearing officer's finding that the claimant demonstrated an active effort to obtain employment each week during the entire qualifying period by performing active work search efforts documented by job applications and/or work search contacts.

Because the carrier's November 28, 2016, DWC-45, which met the requirements of Rule 141.1(d), was filed timely to dispute the third quarter of SIBs, and because the claimant did not meet the requisite number of work searches during each week of the third quarter qualifying period, we reverse the hearing officer's determination that the claimant is entitled to third quarter SIBs, and we render a new decision that the claimant is not entitled to third quarter SIBs.

SUMMARY

We reform the decision as follows to state the correct issues as agreed to by the parties:

Is the claimant entitled to SIBs for the third quarter, November 24, 2016, through February 22, 2017?

Did the carrier waive its right to contest the claimant's entitlement to SIBs for the third quarter by failing to timely request a BRC?

Did the DWC-45 received on November 28, 2016, meet the requirements of Rule 141.1(d) for the purpose of scheduling a BRC and, if not, does good cause exist for failing to meet the requirements?

We reform the decision to add the following to conform to the stipulation made by the parties at the CCH:

During the qualifying period for the third quarter of SIBs the claimant did not work or earn wages.

We reverse the hearing officer's determination that the November 28, 2016, DWC-45 did not meet the requirements of Rule 141.1(d), and there was no good cause for failing to meet the requirements, and we render a new decision that the November 28, 2016, DWC-45 did meet the requirements of Rule 141.1(d).

We reverse the hearing officer's determination that the carrier waived its right to contest the claimant's entitlement to third quarter SIBs by failing to timely request a BRC, and we render a new decision that the carrier did not waive its right to contest the claimant's entitlement to third quarter SIBs.

We reverse the hearing officer's determination that the claimant is entitled to third quarter SIBs, and we render a new decision that the claimant is not entitled to third quarter SIBs.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RICHARD J. GERGASKO, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.**

Carisa Space-Beam
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Margaret L. Turner
Appeals Judge